

Message

From: Payne, James (Jim) [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=61B3204A683041079512B122C580A569-PAYNE, JAME]
Sent: 11/14/2020 6:51:55 PM
To: Fugh, Justina [Fugh.Justina@epa.gov]
Subject: Re: updated information

Thanks as always, Justina!

Sent from my iPhone

On Nov 13, 2020, at 9:56 PM, Fugh, Justina <Fugh.Justina@epa.gov> wrote:

Hi Jim,

Over the course of today, Ferne and I updated the “dearly departing” guide for PAS and non-career SES. Among other things, we changed the font, added the GC and AA/OECA examples to the “areas of responsibility” for the purposes of 18 USC 207(a)(2), and incorporated the Trump pledge paragraph 4 restrictions (for the Foreign Agents Registration Act). See attached. And Shannon, Jennie and I refined the *Negotiation Notification Form*, which is the new name for the former “STOCK Act form.” Initially introduced in the STOCK Act, this requirement is now codified in the Ethics in Government Act, Chapter E, so we are forcing ourselves to adapt.

I double checked myself in the examples in the “Top Seven Things To Know” document:

EXAMPLES

Talking to a headhunter but you have no idea about the identity of possible employer	No need to recuse until you know the name of the possible employer
Talking to friends for general networking ideas or contacts	No need to recuse until you submit a resume or application to a specific job or company
You post your resume on LinkedIn or another social media site	You are NOT seeking employment with the world
“Not interested now, but talk to me after January 2021”	You are NOT seeking employment
“I’ll make a decision on your situation and then we can talk about a possible job”	You need to recuse before making the decision

This example is drawn from the OGE regulation itself, example 9 to paragraph (b), which reads as follows:

Three months prior to the end of the current administration, a political appointee at a large department receives a telephone call from the managing partner of an international law firm. The managing partner asks if the official would be interested in joining the law firm. The official says, “I am not talking to anyone about employment until I leave the Government.” *The official has rejected the unsolicited employment overture and has not begun seeking employment.* (emphasis added).

OGE added this example in 2016 (see [LA 16-06](#)), which was toward the end of a second and final presidential term. But taken out of that historical context, isn’t this example confusing? When you consider the current context of a first term but no ascertainment, what is the significance of “three months prior to the end of the current administration” mean? Is that

different from, say, four months? What this example says to me is that *politicals* can respond by saying something that, for career employees, we might consider to be a deferral not rejection. Given the current posture of the “t-word,” I’m okay leaving the example as it reads now.

Finally, we’ll work on getting information posted to our sharepoint site next week. And I’ve invited my team to observe the counseling session for Greg Sopkin on Monday as a skills development opportunity. We’ll be ready for whatever enfolds!

Justina

Justina Fugh | Director, Ethics Office | Office of General Counsel | US EPA | Mail Code 2311A | Room 4308 North, William Jefferson Clinton Federal Building | Washington, DC 20460 (for ground deliveries, use 20004 for the zip code) | phone 202-564-1786 | fax 202-564-1772

From: Fugh, Justina

Sent: Thursday, November 12, 2020 10:31 PM

To: Payne, James (Jim) <payne.james@epa.gov>

Subject: RE: Follow up to brief discussion re headhunter

Hi Jim,

The best way for me to explain these nuances is to give the talk, so here goes.

You’re allowed to seek other employment, but we always say that “seeking employment and negotiating for employment is more restrictive than you assume, while post-employment is not nearly as restrictive as you fear.” You need to realize that the seeking employment rules were not designed to protect you as the employee but rather to protect the Agency and its operations. We want to be sure that, even if you are looking for another job, the work of this Agency continues without undue influence, bias or conflict. Consequently, you must recuse – which means completely disqualify yourself – from participating as part of your official duties on any particular matter that will have a direct and substantial effect upon the potential employer.

How the ethics rules apply to your situation depend on what your job is and with whom you are seeking or negotiating for employment. That’s why it’s so hard to set out bright lines for every employee. What we can say – and do say, repeatedly – is that the employee must not work on particular matters that will affect the potential employer. But the ethical requirement, set forth at 5 CFR 2635.604(b), says the employee who becomes aware of the need to recuse “must take whatever steps are necessary to ensure that [s/he] does not participate.” The regulation continues to say, “[a]ppropriate oral or written notification [of recusal] may be made to an agency ethics official, coworkers or a supervisor to document and help effectuate” the recusal.” So the fundamental requirement is *disqualification only*, not necessarily notification. That said, public filers must comply with the additional notification requirement at 5 CFR 2635.607, which refers to the former STOCK Act form.

Here’s an easy way to view the restrictions:

SEEKING EMPLOYMENT

- <!--[if !supportLists]--><![endif]-->Unsolicited communication regarding possible employment
- <!--[if !supportLists]--><![endif]-->Any discussions with a view toward reaching an agreement on possible employment
- <!--[if !supportLists]--><![endif]-->You get a response to a job application or employment proposal indicating interest in you
- <!--[if !supportLists]--><![endif]-->You respond, other than rejection, to an unsolicited communication regarding a possible job

RECUSAL BECAUSE SEEKING EMPLOYMENT

- <!--[if !supportLists]--><![endif]-->You must recuse from working on particular matters that affect the prospective employer as a specific party
- <!--[if !supportLists]--><![endif]-->BUT if no response at all yet
- <!--[if !supportLists]--><![endif]-->THEN the restriction does NOT extend to rulemaking and other matters of general applicability

SEEKING EMPLOYMENT ENDS when ...

- <!--[if !supportLists]--><![endif]-->You or they reject the possibility of employment and all discussions cease, or
- <!--[if !supportLists]--><![endif]-->2 months have gone by but you haven't heard anything

NEGOTIATING FOR EMPLOYMENT

- <!--[if !supportLists]--><![endif]-->You enter into two-way discussions or communications with someone about possible job or compensation
- <!--[if !supportLists]--><![endif]-->Statutory requirement to submit "Notification of negotiation or agreement" form is triggered as soon as you take a meaningful step toward reaching an agreement (even if not quite at the point of discussion about actual terms of employment). Must submit form to OGC/Ethics within 3 business days.

RECUSAL BECAUSE NEGOTIATING FOR EMPLOYMENT

- <!--[if !supportLists]--><![endif]-->You must recuse from working on particular matters that affect the prospective employer as a specific party AND that affect it as a member of a class
- <!--[if !supportLists]--><![endif]-->Restriction DOES extend to rulemaking and other matters of general applicability

For your reference, I've attached three documents: (a) a cheat sheet for seeking employment that includes a couple of useful charts, (b) the Top Seven Things To Know About Seeking and Post-employment that is included in the Transition Book, and (c) our chatty guide to seeking/post employment for PAS and non-career SES (who are all most likely subject to 18 USC 207(c) as "senior officials").

Now let's turn to your questions:

- can an individual put in place their own recusal system, without involving others, if the system adequately ensures no involvement with recused matter?
ANSWER: Probably yes, but if the individual is a public filer, then s/he must appropriately file a notification form when negotiations commence.
- is a written documentation of recusal system needed, such as with an email to self or an email to others?

ANSWER: Again, if the individual is a public filer, then s/he must file that notification of negotiation form. And, frankly, having a clear recusal process helps to protect the individual ensure that s/he doesn't inadvertently see something.

Justina

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-----Original Message-----

From: Payne, James (Jim) <payne.james@epa.gov>

Sent: Thursday, November 12, 2020 7:02 PM

To: Fugh, Justina <Fugh.Justina@epa.gov>

Subject: Follow up to brief discussion re headhunter

As to implementing a recusal:

- can an individual put in place their own recusal system, without involving others, if the system adequately ensures no involvement with recused matter?
- is a written documentation of recusal system needed, such as with an email to self or an email to others?

Sent from my iPhone

<Departing EPA for PAS and non career SES upated Nov 2020.docx>

<Negotiation Notification Form for digital signature.pdf>